SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1934

No. 344

ATLANTIC COAST LINE RAILROAD COMPANY,
Appellant,

versus

STATE OF FLORIDA AND E. S. MATTHEWS, MAMIE EATON-GREENE AND W. B. DOUGLASS, ETC., ET AL.,
Appellees.

No. 345

STATE OF FLORIDA AND E. S. MATTHEWS, MAMIE EATON-GREENE AND W. B. DOUGLASS, ETC., ET AL.,
Cross-Appellants,

versus

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.,
Cross-Appellees.

RESPONSE OF ATLANTIC COAST LINE RAILROAD COMPANY TO MOTION OF APPELLEES AND CROSS-APPELLANTS FOR LEAVE TO FILE SUPPLEMENTAL BILL IN THE NATURE OF A BILL OF REVIEW.

Now comes Atlantic Coast Line Railroad Company, appellant and cross-appellee in the above stated causes and

moves the Court to dismiss the motion of appellees and cross-appellants for leave to file supplemental bill in the nature of a bill of review and for grounds of said motion states:

1. The said motion shows no error of law apparent on the face of the record in said cause.

2. No bill of review will lie for errors of law alleged on the face of the decree after the judgment of the appellate court.

3. The motion shows no newly discovered evidence which would have materially affected the decree or have probably produced a different result.

4. No reason is shown why any of the matters relied upon by movants as newly discovered evidence could not have been discovered and submitted in the exercise of reasonable diligence and in time to have been presented in said litigation.

Wherefore, this appellant and cross-appellee moves the Court to dismiss the said motion by appellees and cross-appellants for leave to file supplemental bill in the nature of a bill of review.

Making further response and answer to said motion, appellant and cross-appellee states:

5. We will show herein that practically all of the matters alleged as newly discovered evidence have been considered and acted upon by the Interstate Commerce Commission in this proceeding.

6. It is incorrect for movants in said motion to allege that:

> "This court, in its opinion, in this cause delivered on the 29th day of April, A. D. 1935, proceeded upon the assumption that the Cummer scale of rates, viz., the

lawful State rates of the State of Florida, was unjust and unreasonable and that restitution should not be awarded for that reason upon the basis of such rates, and in the course of its opinion, this court asserted that the burden was upon these appellees and cross-appellants to show that the charges collected from them by the Atlantic Coast Line Railroad Company under and in pursuance of the invalid and unlawful order of the Interstate Commerce Commission herein involved were unreasonable, and in that connection said:

"'In the absence of such a showing the carrier does not offend against equity and conscience in standing on its possession and keeping what it got.'"

The above quotation from the opinion of this Court is divorced from its context. The Court did not assume that the Cummer scale of rates was unjust and unreasonable. Those rates had been found by every court which had considered them to be unjust, unreasonable and confiscatory, and they were so found in the opinion of the District Court on the exceptions to the Master's first report (R. 170).

The Interstate Commerce Commission in its first report dated August 2, 1928 (146 I. C. C. 717), at 724 (page 25 of first record; that is record in case reported in 282 U. S. 194) had found:

> "It is manifest, we believe, that the intrastate rates assailed (Cummer scale) which on the average are less than half of the proposed interstate rates, are less than reasonably compensatory."

That finding had been reaffirmed by the Interstate Commission in its second report dated July 5, 1932 (186 I. C. C. 157 at 165; bound volume of exhibits at page 179), and it was again affirmed in the Commission's third report dated January 9, 1933 (190 I. C. C. 588 at 600; bound volume of exhibits page 170).

The Interstate Commerce Commission prescribed rates to take the place of the Cummer scale of rates. Those rates were twice prescribed, first in the Commission's order of August 2, 1928 (146 I. C. C. 717). That order was set aside by this Court in *Florida* v. *United States*, 282 U. S. 194. The same rates were again prescribed by the Interstate Commission in its second report of July 5, 1932 (186 I. C. C. 157), and were reaffirmed in its third report, as we have above stated, on January 9, 1933 (190 I. C. C. 588).

The rates which the Interstates Commerce Commission prescribed to take the place of the Cummer scale of rates were found by this Court in the present cause to have been the rates

> "prescribed for the future by the appointed administrative agency, and that on two occasions, after scrutiny and study of injustice suffered in the past. The court surveys the years and discerns the same injustice, dominant at the beginning as well as at the end. • • • What was injustice at the date of the second order of the Commission is shown beyond a doubt to have been injustice also at the first."

In these circumstances we respectfully submit that it is incorrect for appellees and cross-appellants to say "That this court, in its opinion in this cause delivered on the 29th day of April, A. D. 1935, *proceeded upon the assumption that the Cummer scale of rates, viz, the lawful state rates of the State of Florida, was unjust and unreasonable,*" etc. It had been established by every authority which had given it consideration that the Cummer scale of rates was unjust, unreasonable, confiscatory and discriminatory.

7. The "certain additional evidence" which the appellees and cross-appellants claim to have and which they allege as "being described in greater detail in said supple-

mental bill," is not newly discovered evidence, nor is it of the kind which would change the result in this case.

That evidence as stated in paragraph II of the proposed supplemental bill in the nature of a bill of review is in substance that the Atlantic Coast Line Railroad Company by tariff issued September 17, 1934, and effective intrastate September 22, 1934, and interstate October 19, 1934, and renewed by tariff effective intrastate February 4, 1935, and interstate February 26, 1935, "voluntarily published rates applicable between all stations on its lines, including all stations in the State of Florida, for the transportation of logs, bolts and billets, in carloads of a minimum carload weight of 60,000 pounds" and which rates were slightly higher than the Cummer scale of rates and lower than the scale of rates prescribed by the Interstate Commerce Commission.

The period which is termed the "restitution period" began February 8, 1929, and ended March 7, 1931. The effective dates of the first aforementioned voluntary tariff changes were September 22, 1934, and October 19, 1934—a little more than three and one-half years after the end of the restitution period. The railroads were then in a "different economic era" (284 U. S. 261), which had only been "revealed" in the early part of 1931. The change became so great that this Court has taken judicial notice of it and has said:

> "It (the change) is the outstanding contemporary fact, dominating thought and action throughout the country. As the Interstate Commerce Commission said in its recent report to the Congress, 'a depression such as the country is now passing through is a new experience to the present generation.' The Commission also recognized in that report 'the very large reductions in railroad earnings which have accompanied the economic depression', and stated that 'the chief cause of these reductions has been loss of traffic.' For

'in such depressions the railroads suffer severely. Their traffic is a barometer of general business conditions.'" *Atchison, Topeka and Santa Fe Rwy. Co.* v. *United States*, 284 U. S. 248, 260;

and 45th Annual Report of the Interstate Commerce Commission, December 1, 1931; House Doc. No. 30, 72d Congress, 1st Sess. p. 114.

The next newly discovered evidence relied upon by the appellees and cross-appellants is set out in paragraph IV of the proposed supplemental bill in the nature of a bill of review and consists of allegations that the Atlantic Coast Line hauled less than 400 cars of logs intrastate in Florida from February 25, 1933 to the end of 1933, whereas the expected movement had been 7,431 cars; and that all of the trainload traffic in Florida in logs over the Atlantic Coast Line had been discontinued; and that the average cost per ton mile (or other comparable unit) of handling the present traffic under the new scale of rates published by the Coast Line "is therefore greater than was the average cost per ton mile (or other comparable unit) of handling the log traffic here involved."

The allegations are not complete. They do not show the circumstances which required the Atlantic Coast Line Railroad Company to make the changes in rates referred to; nor do they show the action of the Commission hereinafter referred to.

Paragraph III of said proposed supplemental bill in the nature of a bill of review shows that the tariffs above mentioned declare that those rates were published to meet motor truck competition and are to expire June 30, 1935.

These matters are for consideration first by the Interstate Commerce Commission. *They were brought to the attention of the Commission in a petition filed on June 4, 1934, in the same docket (No. 18364), by Wilson Cypress Company and Wilson Lumber Company of Florida (two of*

the appellees and cross-appellants in this case) *and F. S. Buffum Co. Inc.* That petition stated at length many of the changes in rates which are set out in the proposed supplemental bill, and prayed as follows:

"(a) That it (I. C. C.) do modify, by appropriate orders, its said order herein (order of July 5, 1932, as amended) as to the intrastate rates from Hines, Florida, to Palatka, Florida, and as to the intrastate rates to Perry, Florida, and Jacksonville, Florida, for distances up to 125 miles by increasing the required minimum weight per car and decreasing the rate as expressed in cents per hundred pounds; or establish such specified intrastate rates to said destinations as shall be similar to said scale of rates approved by said Southern Freight Association and said Southwestern Freight Bureau, or, in the alternative,

(b) That said Interstate Commerce Commission, by appropriate orders, do modify said order herein by excluding therefrom the intrastate rates thereby affected to said destinations, viz, Palatka, Perry and Jacksonville, Florida, in order that the reasonableness of said rates to said destinations may be inquired into and determined by the Florida Railroad Commission and the propriety of the establishment of rates to said destinations as hereinabove sought from said Interstate Commerce Commission may be considered and determined by said Florida Railroad Commission."

The Atlantic Coast Line answered said petition on July 9, 1934, Paragraph VI of said answer is as follows:

"Answering paragraph 14 of the petition, this defendant, having had no opportunity to check and verify the figures therein contained purporting to represent the movement of logs and the revenue derived therefrom during the year 1933, neither admits nor denies the correctness of said figures, but defendant avers that if said figures do correctly portray the decline in its log traffic in Florida in 1933 this decline is in no

way out of line with the general falling off in the log movement over defendant's system, which is attributable primarily to the prevailing general depression in business. Even in the case of those roads which have established the so-called 'truck competitive' rates on logs, referred to in the petition, there has been a tremendous decline in the movement of logs, and in the case of a number of such roads an even greater decline in the gross revenues derived therefrom. For example, the Central of Georgia Railway's log traffic in 1933 was only 11 per cent. of its log traffic in 1929, while its revenue was 12 per cent; the Illinois Central Railroad's log traffic in 1933 was 17 per cent. of its log traffic in 1929, while its revenue was 12 per cent; the Louisville & Nashville's log traffic in 1933 was 22 per cent. of its log traffic in 1929, while its revenue was 20 per cent; for the Mobile & Ohio Railroad the corresponding percentages were 25 per cent. and 15 per cent, respectively; for the Seaboard Air Line Railway the corresponding percentages were 23 per cent. and 25 per cent, respectively; for the Southern Railway 21 per cent and 20 per cent respectively; for the Yazoo & Mississippi Valley 22 per cent. and 17 per cent. respectively. In the case of all of the foregoing roads, to the extent that the logs may have moved under the transit tariffs the revenues above referred to represent the gross revenue on the inbound movement of logs to the transit point. They do not, therefore, represent the net revenue after refund has been made in connection with the outbound movement of the manufactured product under the transit tariffs. Defendant further says that if, as alleged in said paragraph, 162 cars of logs moved over defendant's lines in Florida in 1933, prior to February 25th, this figure is itself sufficiently indicative of the cause of the decline in the movement, since it purports to include the total movement for a two months' period and at a time when the Cummer scale was in effect.

"Further answering said paragraph, defendant denies that the Commission's order was 'predicated' upon its estimates made in July, 1932, with respect to

the future movement and the revenue therefrom. Defendant respectfully asks that the report of the Commission be considered and read as a whole as setting forth the grounds upon which its order was predicated."

The Interstate Commerce Commission considered said petition and the answer thereto, and entered its order on July 19, 1934, *denying the prayers of said petition.* The said order of the Commission, omitting its caption, is as follows:

"Upon further consideration of the record in the above-entitled proceeding and of petition of interveners Wilson Cypress Company, Wilson Lumber Company of Florida, and F. S. Buffum Company, Inc., for modification of the findings and order therein and defendant's answer to said petition:

"It is ordered, that said petition be, and it is hereby, denied. By the Commission. George B. McGinty, Secretary."

We herewith tender in connection with this brief copies of these proceedings before the Interstate Commerce Commission.

8. *Discontinuance of trainload traffic in Florida:* Reference is made to the discontinuance of trainload log traffic in Florida over the Atlantic Coast Line in paragraph IV of the proposed supplemental bill in the nature of a bill of review. This subject is dealt with by the Interstate Commerce Commission in its report rendered July 5, 1932, 186 I. C. C. at page 168 (Bound volume of exhibits, page 182). The case growing out of that report is case No. 342, October term, 1933, Supreme Court of the United States (see *Florida* v. *United States*, 292 U. S. 1).

The log tonnage over the Atlantic Coast Line reached its peak in 1926 when 36,799 cars were hauled (186 I. C. C.

169). It continued to decline year by year until in 1929 the number of cars had become 13,207. In 1930 that number had become 9,376. There was no change in the rates on logs in 1927 and 1928. In 1929 the change in rates became effective in February. The general economic depression began in 1929 and in that year a part of the plant of the Wilson Cypress Company burned and was closed down (R. 729 in case No. 342, reported in 292 U. S. 1). Two of the large mills belonging to Brooks-Scanlon Corporation and Putnam Lumber Company discontinued their trainload shipments immediately after February 8, 1929. The fact is that the economic circumstances were against having the mills at tidewater and the logs 150 or more miles away in the woods. Witnesses testified substantially to that effect as will be seen by the evidence of Mr. Fleishell (Vol. II, pp. 596, 610 and 615, first record; that is, the record in case reported in 282 U. S. 194). Part of Mr. Fleishell's testimony given at page 615 of the first record is as follows:

> "The so-called Cummer log rates in Florida are not of such nature as to make them especially desirable where you have to draw your logs one hundred and twenty or thirty or forty miles. They are too high, and for that reason we are going to the woods, and for the reason we have our weight net going to tidewater when we get out there. On forty per cent. we get nothing back for on this haul."

The witness meant it takes three cars, sometimes three and one-half cars of logs to make one car of lumber; that he paid freight on the logs from the woods to the tidewater mills on those three or three and one-half cars for each car of lumber and then paid the freight on the outbound lumber from tidewater; but if the logs were sawed into lumber in the woods he would pay freight only on the outbound manufactured lumber and not on the logs to the mills.

F. H. Wilson testified at page 580 (Vol. II, first record) as follows:

> "I would put the mill into the timber because it would be an economical way of manufacturing the timber regardless of any log rates."

At page 581 (first record) he testified:

> "As to whether if you go into the timber to put in your mill and saw it, you have got an added freight rate in getting it away from there, that is not on the lumber, you may have an added freight rate, but it will be a good deal less than the freight rate on logs."

The witness, J. S. Foley, then Vice President and General Manager of the Brooks-Scanlon Corporation, testified at page 661 (Vol. II, first record):

> "It is distinctly to the advantage of the owner of the timber to locate his mill at the timber."

Much the same testimony was given before the Commission in the cases at bar. See Fleishell's evidence at R. 822 of the case at bar; and evidence of J. S. Foley, R. 865 and 870 of the record in the present case.

9. Referring to paragraphs V, VI, VII, VIII, IX, X, XI, XII, and XV of the proposed supplemental bill in the nature of a bill of review, the matters and things purported to be set up in said paragraphs relate to reductions in rates on logs, etc. in 1931, 1932 and 1933. All, or nearly all, of those matters have been brought to the attention of the Interstate Commerce Commission, passed upon by that Commission in its report of January 9, 1933 (190 I. C. C. 588) and in the petition filed with the Commission on June 4, 1934, to which reference has hereinbefore been made; and which was passed upon by the Commission July 19, 1934. The Commission determined, as we have seen, that none of

those allegations was sufficient to justify the reopening of the case. No effort was made to review that last order of the Commission. So that none of those matters can be classed as newly discovered evidence, nor can any of them be ranked as matters which have not had the consideration of the Interstate Commerce Commission. That consideration has resulted adversely to the contentions and positions of the claimants, that is, the appellees and cross-appellants in these cases. If there be an exception to this it is specific and not one of kind.

In the case of *Georgia Public Service Commission* v. *Atlantic Coast Line Railroad Company*, 190 I. C. C. 588, at page 597 (Bound volume of exhibits page 167) the Interstate Commerce Commission found:

> "Exclusive of the movement in trainloads, defendant handled a monthly average of 282 carloads of logs over 6 feet in length between points in Florida during the year 1930, an average of 198 carloads a month during 1931, and an average of 188 carloads a month during the first eight months of 1932. In this connection it should be remembered that in 1930, when the movement was heaviest, and to April 10, 1931, the interstate scale of rates prescribed in the original report was in effect, and that during the remainder of 1931 and 1932 the much lower Cummer scale was charged. The monthly movement, exclusive of that in trainloads, since the former hearing, July 21, 1931, has averaged substantially the same as from December 1, 1930 to August 1, 1931. As stated in our prior report on further hearing the main depression in the lumber industry in Florida began about the latter part of 1930. At the time of the last previous hearing, the only remaining trainload movement was from Hines to Palatka."

At page 598 of 190 I. C. C. the Commission also found:

> "The record warrants the conclusion that truck competition and, to a lesser degree, carrier competition,

has been sufficiently compelling in the judgment of the responsible traffic officials of the various railroads operating in the western portion of southern territory to warrant the establishment experimentally of the low per car rates on logs hereinbefore referred to; that these reduced rates have not as yet succeeded in regaining for the railroads which established them any great amount of log traffic; that it is doubtful if the log traffic now moving by truck for the shorter distances, particularly 35 miles and under, can be regained by these or any other rates that the carriers could make."

10. Movants appear to have overlooked the petition filed before the Interstate Commerce Commission on June 4, 1934 and to which reference has been herein made. No reference to that petition is found in movants' motion in this matter. The consideration by the Commission of the matters and things alleged in that petition appears to cover every material allegation upon which movants rely for support of their motion for leave to file a supplemental bill in the nature of a bill of review. If there be any new matters stated by them in said supplemental bill they are of the same kind as those which the Commission has passed upon. It is, therefore, certain that the matters relied upon by the movants to justify the filing of their motion for leave to file a supplemental bill in the nature of a bill of review *are not newly discovered and have not only been known to them but have been the subject matter of proceedings before the Interstate Commerce Commission.* The proper weight and effect to be given to the facts alleged in the aforesaid petition filed June 4, 1934 to reopen the proceedings before the Commission were for determination by the Interstate Commerce Commission which is a body set apart for that purpose, and the weight to be given to its decisions has been well stated by this Court in the case at bar.

11. It is to be noted that in paragraph XIV of the aforesaid petition filed June 4, 1934 before the Interstate Commerce Commission, and hereinbefore referred to, reference is made to the fact that of the cars of logs which moved intrastate in Florida over the Atlantic Coast Line Railroad Company in 1933 at least 162 cars moved prior to February 28, 1933.

During the period from January 1 to February 25, 1933, the Cummer scale of rates was in effect over the Atlantic Coast Line Railroad Company applicable to the logs referred to, so it could not have been the change in rates which caused the decline in traffic referred to by the movants. The depression and the falling off of business had a strong influence and the weight to be given to those facts has been determined by the Interstate Commerce Commission in this cause, as hereinbefore set out.

WHEREFORE, it is respectfully submitted that movants' motion for leave to file a supplemental bill in the nature of a bill of review should be determined to be without merit, and should be denied.

CARL H. DAVIS,
W. E. KAY,
ROBERT C. ALSTON,
WILLIAM H. SIBLEY,
Attorneys for Atlantic Coast Line Railroad Company.

May 27, 1935.